

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Petition for Forbearance Under
47 U.S.C. § 160(c) for Imposition of
Additional Unbundling Obligations

WC Docket No. 05-170

OPPOSITION OF VERIZON TO PETITION FOR FORBEARANCE

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I. SUMMARY

This is not a petition for forbearance. The CLEC Petitioners request the imposition of new unbundling obligations. Indeed, these are obligations that this Commission expressly refused to impose in the *Triennial Review Remand Order*,² where it rejected the same arguments the CLECs present here. Because Congress intended for forbearance to *remove* regulation in favor of market competition — and because the CLEC Petitioners seek to replace market competition with regulation — their petition should be denied out of hand.

In addition, the petition is based on a fundamental legal error. The CLECs appear to believe that forbearance would cause some pre-existing obligation to unbundle DS1 high-capacity loops and dedicated transport to take effect. But, as the Supreme Court and the D.C. Circuit have made clear, there is no such pre-existing obligation under the 1996 Act. Instead, unbundling obligations exist only by order of the Commission, and can be imposed only after the Commission makes a finding of impairment and, moreover, concludes that unbundling is

¹ The Verizon telephone companies (“Verizon”) are identified in Appendix A to these comments.

² Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533 (2005), petitions for review pending, *Covad Communications Co. v. FCC*, Nos. 05-1095 *et al.* (D.C. Cir.) (“*Triennial Review Remand Order*” or “*TRRO*”).

warranted considering the costs it imposes. In the *TRRO*, the Commission found that CLECs are not impaired without unbundled access to the facilities at issue here, or otherwise refused to require unbundling. Therefore, even aside from the fact that the Commission cannot forbear from a decision *not* to impose a regulatory obligation, the forbearance that the CLEC Petitioners seek would not result in the affirmative finding of impairment necessary for the unbundling obligations that they actually want the Commission to impose. For this reason as well, the petition should be denied.

Finally, even if the petition were charitably interpreted as a request for reconsideration of the *TRRO* — and it should not be, because these same CLECs already filed a separate petition for reconsideration — the Commission should still deny it. The CLECs have hardly addressed, much less responded to, the Commission’s actual reasons for its rulings in the *TRRO*. In fact, the Commission fully explained its reasons for rejecting CLECs’ arguments when it made wire-center-wide “no impairment” findings for DS1 loops. The Commission also properly rejected CLECs’ requests for a virtually unlimited number of unbundled DS1 transport circuits in the context of enhanced extended links (“EELs”). Finally, the Commission correctly rejected the CLECs’ proposals to eliminate or further dilute the EEL eligibility criteria, which already do little to ensure that CLECs do not obtain UNEs to provide exclusively long-distance services.

II. THE PETITION SHOULD BE DENIED BECAUSE THE RELIEF REQUESTED CANNOT BE OBTAINED THROUGH FORBEARANCE

A. The Petition Should Be Denied Because Forbearance Necessarily Results in the Elimination of Regulation

The Commission’s forbearance authority is *deregulatory*, and is based on Congress’s determination that market forces should be relied on where they can be expected to have results that are equivalent or superior to regulation. Indeed, § 160 reflects Congress’s preference for

competition, as it *requires* the Commission to “forbear from applying any regulation or any provision” of the Act when the statutory criteria are satisfied. 47 U.S.C. § 160(a). As the Commission has recognized, the fundamental question in considering a forbearance petition is therefore whether “market conditions” and “market forces” are sufficient to ensure that rates will be just and reasonable and that consumers will be protected in the *absence of* regulation, such that forbearance is in the public interest.³ This is confirmed by the text of § 160, because, as the Commission has held, “the word “forbear . . . means to desist from; cease.”⁴ Thus, when the Commission forbears, it ceases to enforce a regulatory or statutory requirement, permitting carriers to compete without the constraints of regulation, but within the constraints of market forces.

The CLEC Petitioners, however, do not want the Commission to *cease* regulating. Nor do they want to compete in the market. Instead, they want the Commission to reverse decisions made in the *TRRO not to regulate*. Thus, where the Commission held that incumbents have no obligation to provide UNE DS1 loops to *any* buildings in a wire center with at least 60,000 business lines and four fiber-based collocators,⁵ the CLECs seek the imposition of unbundling requirements for some buildings in those wire centers. And where the Commission held that incumbents have no obligation to provide more than 10 DS1 UNE transport circuits on any route

³ Memorandum Opinion and Order and Notice of Proposed Rulemaking, *Personal Communication Industry Association’s Broadband Personal Communications Services Alliance Petition for Forbearance*, 13 FCC Rcd 16857, ¶ 18 (1998); *see also* Memorandum Opinion and Order, *Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services*, 20 FCC Rcd 9361, ¶ 9 (2005) (“*IP Forbearance Order*”) (explaining that forbearance is a “means by which the Commission may remove existing requirements that have been rendered unnecessary by market developments”).

⁴ *IP Forbearance Order* ¶ 5 (citation and internal quotation marks omitted).

⁵ *See TRRO* ¶ 178.

between two incumbent wire centers,⁶ the CLECs seek to require incumbents to do just that, whenever they use those circuits as part of an EEL. Finally, where the Commission reaffirmed that incumbents are not required to provide an unbundled loop and transport combination where the circuit does not satisfy certain criteria,⁷ the CLECs seek to require the provision of EELs irrespective of whether those criteria are satisfied. In each case, the CLECs do not propose that regulation give way to market competition, but instead that the Commission impose new UNE regulations that do not exist today.

The CLECs’ petition, therefore, cannot be squared with the text or purpose of § 160. Indeed, in similar circumstances, the D.C. Circuit recognized that, where the Commission has refused to impose an unbundling obligation, there is nothing to forbear from. In *USTA II*,⁸ CLECs challenged the Commission’s decision not to require the unbundling of hybrid loops, claiming that it was an unlawful exercise of the Commission’s forbearance authority. *See* 359 F.3d at 578-79. The D.C. Circuit rejected their arguments, finding that, where the Commission “withhold[s] unbundling orders” for a particular facility, there is no regulatory requirement that the Commission could cease applying, because forbearance “obviously comes into play only for requirements that exist” in the first place. *Id.* at 579-80.

For these reasons, the Commission should deny the CLECs’ petition out of hand.

⁶ *See id.* ¶ 181.

⁷ *See id.* ¶ 85 & n.244.

⁸ *United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir.), *cert denied*, 125 S. Ct. 313, 316, 345 (2004).

B. The Petition Should Be Denied Because Forbearance Cannot Be Used To Create Unbundling Obligations

Presumably recognizing this fundamental flaw in their petition, the CLECs attempt to recast the Commission’s findings of no impairment as “limitations on an incumbent LEC’s unbundling obligations pursuant to Section 251(c)(3).” Petition at 1. That is, the CLECs contend that, if the Commission forbears from enforcing these so-called “limitations,” incumbents will necessarily be required by statute to provide additional unbundling. The CLECs’ claim is contrary to binding Supreme Court and D.C. Circuit precedent.

Indeed, the Supreme Court long ago held that § 251(c)(3) does not establish an “underlying duty to make all network elements available,” to which the Commission could “create isolated exemptions” as a matter of “regulatory grace.” *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 391-92 (1999). Instead, under the 1996 Act, the provision of UNEs is an exceptional requirement that applies only under statutorily defined circumstances. *See id.* at 390 (finding that, if Congress had intended to authorize “blanket” and “unrestricted” access to UNEs, the Supreme Court found that “it would not have included § 251(d)(2) in the statute at all”). The 1996 Act, therefore, requires the Commission, *before* imposing an unbundling requirement, “to determine on a rational basis *which* network elements must be made available,” applying the standards prescribed by the Act. *Id.* at 391-92. Moreover, it means that, where the Commission has not made a finding of impairment and has not issued an unbundling order, incumbents have no unbundling obligations at all under § 251(c)(3).

Following on from the Supreme Court’s ruling, the D.C. Circuit has held that Congress “made ‘impairment’ the touchstone” for any requirement that incumbents provide UNEs. *United States Telecom Ass’n v. FCC*, 290 F.3d 415, 425 (D.C. Cir. 2002); *see USTA II*, 359 F.3d at 579 (rejecting CLECs’ claims that the Commission can “order unbundling even in the absence of an

impairment finding if it finds concrete benefits to unbundling that cannot otherwise be achieved”). The Commission itself has acknowledged that it cannot “impose [UNE] obligations first and conduct [the] ‘impair’ inquiry afterwards.” *Supplemental Order Clarification*⁹ ¶ 16. For these reasons, the D.C. Circuit vacated prior Commission decisions to impose UNE obligations everywhere because it could not determine exactly where competitors are *not* impaired, holding instead that the statute requires the Commission to determine where carriers *are* impaired and to order unbundling only in those areas, and then only after taking into account the “costs of unbundling (such as discouragement of investment in innovation).” *USTA II*, 359 F.3d at 571-72, 574.

Therefore, the Commission’s determinations in the *TRRO* that incumbents are not required to provide unbundled access to DS1 loops and transport in the instances addressed in the petition are not “limitations” on a statutory obligation to unbundle. Instead, they are determinations that the statute does not require such unbundling in the first instance. For these reasons, there is again nothing for the Commission to forbear from enforcing.

Finally, because Congress explicitly set forth in § 251(d)(2) the criteria that the Commission must satisfy before it requires unbundling, a petition under § 160 could never give rise to unbundling obligations under § 251(c)(3). Instead, unbundling cannot be ordered except pursuant to § 251(c)(3) and § 251(d)(2). Therefore, the CLECs’ attempts to demonstrate that their requests satisfy the criteria in § 160 are irrelevant.

These basic errors provide an independent basis for denying the CLECs’ petition.

⁹ Supplemental Order Clarification, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 9587 (2000) (“*Supplemental Order Clarification*”), *aff’d*, *Competitive Telecomms. Ass’n v. FCC*, 309 F.3d 8 (D.C. Cir. 2002).

III. THE COMMISSION SHOULD REJECT THE CLECS' PROPOSALS FOR MODIFICATION OF THE COMMISSION'S NO IMPAIRMENT FINDINGS AND ITS EEL ELIGIBILITY CRITERIA

The CLECs filed their self-titled petition for forbearance on March 28, 2005. Although the Commission, therefore, could treat the CLECs' petition for forbearance as an improperly captioned (but timely) petition for reconsideration, it should not do so. This same group of CLECs, represented by the same counsel, already filed a separate petition for reconsideration of certain aspects of the *TRRO*.¹⁰ There is substantial overlap between the instant petition and the CLECs' petition for reconsideration — in both, the CLECs take issue with the Commission's DS1 transport cap and retention of the EEL eligibility criteria. *Compare* Petition at 19-27 with Reconsideration Petition at 5-10. There is no reason why the CLECs' other argument — their claim that the Commission should have excluded certain buildings from its no impairment findings in the wire centers where it did not require DS1 loop unbundling — could not have been presented in their petition for reconsideration, where it would have been subject to comment during the cycle the Commission established for all petitions for reconsideration of the *TRRO*. The Commission should not reward these CLECs' blatant attempt to repackage reconsideration requests as a forbearance petition in order to take advantage of the statutory period applicable to such petitions. *See* 47 U.S.C. § 160(c).

¹⁰ *See* Birch Telecom *et al.* Petition for Reconsideration, WC Docket No. 04-313, CC Docket No. 01-338 (FCC filed Mar. 28, 2005) (“Reconsideration Petition”).

In any event, if the Commission were to treat their petition as a miscaptioned petition for reconsideration — to which the statutory requirement in § 160(c) would not apply — that petition should be denied for the reasons set forth below.¹¹

A. The Commission Should Reject the CLECs’ Challenges to the Commission’s Wire-Center No Impairment Findings for DS1 UNE Loops

1. In the *TRRO*, the Commission did not require unbundling of DS1 loops in those “location[s] within the service area of” the limited set of “wire center[s] containing 60,000 or more business lines and four or more fiber-based collocators.” *TRRO* ¶ 146. The Commission stated its view that these thresholds “best minimize[d] and balance[d] any under-inclusiveness and over-inclusiveness” in its unbundling determinations for DS1 loops. *Id.* ¶ 169. The Commission further noted that the wire centers in which it did not require unbundling of DS1 loops have *both* “particularly extensive competitive fiber build-out” *and* “particularly high revenue opportunities,” and concluded that “competitors actually have deployed, or will deploy,” higher-capacity fiber throughout these wire centers and could channelize those facilities to “offer service at the DS1 capacity level.” *Id.* ¶¶ 171, 179. Finally, the Commission found that the “availability of . . . incumbent LEC [tariffed special access] offerings . . . mitigates” any concerns that a wire-center-wide finding of no impairment is overinclusive, because competitive facilities can be “complemented, as a gap-filler, by services using an incumbent LEC’s tariffed alternatives for buildings,” pending further deployment of competitive facilities. *Id.* ¶ 163.

The CLEC Petitioners address none of this in claiming that CLECs are impaired without UNE DS1 loops to serve “small buildings” in the wire centers where the Commission did not

¹¹ In all events, the Commission should issue an order within the time period specified in § 160(c) denying the CLECs’ “forbearance” petition for the reasons set forth in Part II, to avoid any possible future litigation about whether that petition was “deemed granted.”

require any DS1 loop unbundling. Petition at 9. And, continuing their pattern throughout this proceeding, the CLECs provide no evidence in support of their impairment claims. The record, however, showed that, of the more than 23,000 DS1 loops the CLEC Petitioners were purchasing from Verizon alone, they were obtaining more than 70 percent as special access, not UNEs.

The CLECs also do not attempt to define the scope of the relief they are seeking, as they provide no evidence on the extent to which the wire centers where the Commission did not require DS1 loop unbundling — which are “in or near a large central business district,” such as in New York, Boston, and Philadelphia, *TRRO* ¶ 167 — actually contain DS1 high-capacity customers in the “small buildings” where they seek to have the Commission require unbundling. Indeed, the CLECs do not identify even a single building in these wire centers that they claim cannot be served without UNE DS1 loops, much less prove their claims of impairment.

The CLECs, therefore, have done nothing to call into question the Commission’s determination that competition is possible without DS1 UNE loops throughout the wire centers where the Commission did not require DS1 loop unbundling. The record before the Commission, moreover, demonstrated that carriers are providing high-capacity service in those wire centers and in the other areas where demand for DS1 and other high-capacity services is concentrated, using a combination of their own or other alternative facilities and special access services purchased from incumbent LECs, with extremely limited reliance on UNEs. The record also showed that carriers are providing high-capacity services to small and medium-size businesses such as antique dealers, book stores, dry cleaners, florists, gas stations, and hair dressers, to name a few.

The CLECs also ignore the flourishing intermodal competition to provide high-capacity services to predominantly residential and small office buildings, particularly from cable

companies. Indeed, an increasing number of business customers are using cable modem service in lieu of traditional special access and private line services.¹² A study by In-Stat/MDR found that 44 percent of small businesses were using cable modem service in their main offices for some high-capacity services.¹³ Analysts estimate that nearly 60 percent of “small- to medium-sized businesses (SMB) are located within a few hundred feet of the local hybrid fiber/coaxial network,”¹⁴ and that roughly 25 percent already have a cable drop.¹⁵ Six of the seven largest cable system operators (which, collectively, represent over 90 percent of consumer cable modem subscribers) already offer broadband services to small businesses.¹⁶ Each of these cable operators has developed a separately branded service for business customers (e.g., Time

¹² See, e.g., Courtney Munroe, IDC, *U.S. Private Line Forecast and Analysis, 2002-2007* at 1 (Dec. 2003) (special access revenues are declining “due to continued decline in price on a per-megabit basis, as well as competition from broadband circuits in the form of DSL and cable modem adoption by enterprises”); Kneko Burney, In-Stat/MDR, *Cash Cows Say “Bye-Bye”: The Future of Private Line Services in US Businesses* at 12 (Dec. 2003) (“In-Stat/MDR Private Line Report”) (“As broadband offerings penetrate businesses in more ways, including in home offices, they will become a more compelling replacement to good, ole’ private lines.”).

¹³ See *In-Stat/MDR Private Line Report* at 19, Tables 9 & 10.

¹⁴ Jea-Hun Shim & Richard Read, Credit Lyonnais Securities, *The U.S. Cable Industry – Act I*, at 196 (Nov. 20, 2002) (“*Credit Lyonnais Cable Industry Report*”) (estimating six million SMBs within a few hundred feet); see also Kneko Burney, In-Stat/MDR, *The Big Comeback? Excerpts from ‘Business Broadband in a Changed Economy’* at 2, 4 & Fig. 2 (May 2002) (there are an estimated 10.5 million small and medium businesses nationwide (2.2 million with 5-99 employees, 85,000 with 100-999 employees, and 8.2 million characterized as small office/home office)); Citigroup Smith Barney, *Cable: Capitalizing on the SME Opportunity; Detailed Note* (June 4, 2003) (30 to 50 percent of the small- and medium-enterprise market is located within 50 to 100 feet of existing cable modem networks).

¹⁵ See *Credit Lyonnais Cable Industry Report* at 196 (estimating 2.5 million SMBs passed by existing cable infrastructure); Dan Sweeney, *Cable’s Plumb Position*, America’s Network (July 1, 2002) (Jedai Networks, which develops equipment “intended to enable [cable] MSOs to serve business customers,” estimates “that roughly 25% of businesses already have a cable drop, including many in downtown office buildings”).

¹⁶ See Mike Lauricella, et al., Yankee Group, *Cable MSOs: Ready to Take Off in the Small and Medium Business Market* at 4 (Mar. 2002).

Warner’s “Road Runner Business Class” and Comcast’s “Commercial Internet Service 2.0” and “Comcast Pro”), and several have formed separate business units dedicated to the provision of broadband to business customers (*e.g.*, Comcast Business Communications, Cox Business Services, and Charter Business Networks).¹⁷

2. Instead of addressing any of these points, the CLECs support their petition with a variety of claims that the Commission has already rejected.

For example, the CLECs assert that the Commission’s “wire-center based test is a poor proxy for assessing impairment.” Petition at 16. But the building-by-building analysis that these CLECs support would have been inconsistent with the CLECs’ own acknowledgement that they build their fiber rings “in a metropolitan area,” and that they “design and build the ring such that it directly passes and can be used to serve as many of th[e] [commercial] buildings [in that area] as possible.” *TRRO* ¶ 154. A building-by-building analysis, therefore, would have violated the D.C. Circuit’s directive that “[a]ny process of inferring impairment (or its absence) from levels of deployment depends on a sensible definition of the markets in which deployment” occurs. *USTA II*, 359 F.3d at 574.

In addition, the CLECs’ claim is erroneous because it presumes that impairment exists wherever competitors cannot serve every potential customer in a given area immediately. The D.C. Circuit, however, has held that impairment cannot be based on factors “faced by virtually any new entrant in any sector of the economy, no matter how competitive the sector.” *USTA I*, 290 F.3d at 426. As in all sectors, entry in the communications sector is a gradual process, with new entrants targeting their facilities toward the most attractive customers and segments initially.

¹⁷ For all of these reasons, there is no merit to the CLECs’ view (at 13-15) that these customers will lack competitive alternatives if CLECs cannot obtain UNE DS1 loops.

The new entrants then expand over time to serve additional customers, with the base of initial customers making it more attractive to serve further customers in an area. Here, the record demonstrated that CLECs can economically deploy fiber rings across wire centers and can use loops deployed from those rings to provide service at both the DS1 and higher capacity levels, thus demonstrating that entry is possible and the normal, gradual process of expansion can occur. The record also showed that CLECs can and do use special access to extend the reach of their fiber networks to provide high-capacity service to customers at all levels, including at the DS1 level.¹⁸

The CLECs also assert that a building-specific test could be easily administered, but only by proposing that the Commission limit its impairment analysis to those buildings where carriers have already deployed competitive facilities. *See* Petition at 16-17. The Commission, however, correctly recognized that the 1996 Act requires that it evaluate impairment based on the “ability” of carriers to compete without UNEs, not on whether carriers are already competing without UNEs. *See, e.g., TRRO* ¶ 28; *see also* 47 U.S.C. § 251(d)(2); *Iowa Utils. Bd.*, 525 U.S. at 390 & n.11. Consistent with the statute and the Supreme Court’s construction, the D.C. Circuit has repeatedly held that the critical inquiry is whether CLECs are *capable* of competing without

¹⁸ These facts, along with the extensive intermodal competition for predominantly residential and small office buildings, thoroughly refute the CLECs’ unsubstantiated assertions that ILECs would (or even could) attempt to engage in price squeezes with respect to specific buildings in wire centers where the Commission did not require DS1 loop unbundling. *See* Petition at 11-12. In any event, the Commission is required to address any alleged risk of price squeezes directly — through its regulation of special access prices — rather than by requiring unbundling. *See USTA II*, 359 F.3d at 570-71 (holding that the Commission cannot require unbundling where it can address an alleged source of impairment directly or through a “narrower alternative” with “fewer disadvantages” than imposing UNE obligations); *see also TRRO* ¶ 23 (“[N]either the impairment inquiry nor the other aspects of the unbundling framework should be distorted to compensate for alleged failings in related but distinct areas of the Commission’s regulatory regime.”).

UNEs — that is, whether “competition is possible” without UNEs in a particular area. *USTA II*, 359 F.3d at 575; *see USTA I*, 290 F.3d at 427 (impairment exists only for those network elements that are “*unsuitable* for competitive supply”) (emphasis added). Because the Commission could not limit its inquiry in the manner in which the CLECs propose, it correctly found that even “a properly designed building-specific test” would “entail steep” and “insurmountable” “hurdles with regard to administrability” and should be rejected. *TRRO* ¶ 155; *see id.* ¶¶ 157-160 (describing the numerous hurdles).

The CLECs also assert that wholesale DS1 circuits are not available, or were predominantly available from AT&T and MCI, and will no longer be available from those carriers after their pending transactions with SBC and Verizon. *See* Petition at 9-10. As an initial matter, the CLECs’ focus on wholesale is misplaced, because competition is possible — and therefore there is no impairment — where carriers can provide DS1 services over channels on *self*-deployed, higher-capacity facilities, irrespective of whether those carriers elect to provide access to those channels at wholesale. That is because the purpose of the 1996 Act is to promote competition, not to further the interests of particular competitors or to ensure that individual competitors have enduring wholesale suppliers. *See, e.g., USTA II*, 359 F.3d at 576. In any event, evidence the CLECs themselves submitted confirms that DS1 loops are available at wholesale in wire centers serving the central business districts where the Commission found no impairment for DS1 loops. *See TRRO* ¶¶ 154, 170.¹⁹ Verizon and other BOCs also submitted

¹⁹ *See also, e.g.,* Declaration of Dan J. Wigger on Behalf of Advanced Telecom, Inc. ¶ 24 (reporting that wholesale DS1 loops are available in one of the “metropolitan areas” (Tacoma) it serves in Washington), attached to Initial Comments of Loop and Transport Coalition, WC Docket No. 04-313, CC Docket No. 01-338 (FCC filed Oct. 4, 2004); Declaration of Mark A. Jenn ¶ 9 (asserting that, “[o]utside of the downtown areas of major metropolitan areas,” DS1

evidence that dozens of carriers — not merely AT&T and MCI — advertise the availability of DS1 loops at wholesale.²⁰ Finally, consistent with the Commission’s determination that changed circumstances should not lead to a finding of impairment in areas where the Commission found no impairment at the time of the *TRRO*,²¹ the pending combinations of SBC/AT&T and Verizon/MCI do nothing to affect the Commission’s determinations of where competition is *possible* without UNEs.

3. Finally, even on their own terms, the CLECs’ proposals must be rejected. As an initial matter, the CLECs propose requiring unbundling of DS1 loops to *all* predominantly residential buildings, despite their own claim that the ability of competitors to serve a building depends on the demand for high-capacity services in the building, not on whether the building is predominantly residential. In addition, the analogy the CLECs draw to FTTH loops is completely misplaced. *See* Petition at 18 & n.47. In FTTH overbuild situations, the Commission did not require incumbents to unbundle the full capacity of the FTTH loop, but only a voice-grade channel.²² This limited, *narrowband* unbundling obligation provides no basis for requiring additional unbundling of high-capacity loops to these same locations.

wholesale loops are not available), attached to Comments of ATX Communications et al., WC Docket No. 04-313, CC Docket No. 01-338 (FCC filed Oct. 4, 2004).

²⁰ *See UNE Fact Report 2004*, at III-14 to III-15, Table 9, WC Docket No. 04-313 & CC Docket No. 01-338 (FCC filed Oct. 4, 2004); Verizon’s Nogay Decl. Exhs. 6-11.

²¹ *See* 47 C.F.R. § 51.319(a)(4)(i), (a)(5)(i), (e)(3)(i)-(ii).

²² *See* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, ¶ 277 (2003) (“*Triennial Review Order*” or “*TRO*”), *vacated in part and remanded, USTA v. FCC*, 359 F.3d 554 (D.C. Cir.), *cert. denied*, 125 S. Ct. 313, 316, 345 (2004); Order on Reconsideration, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 19 FCC Rcd 15856, ¶¶ 21, 23 (2004).

In addition, the threshold the CLECs’ propose (at 18-19) for small office buildings — requiring unbundling to any small office building not already purchasing at least *four* DS3s of high-capacity services — is inconsistent with the Commission’s UNE DS3 loop cap. The Commission “limit[ed] the number of unbundled DS3s that a competitive LEC can obtain at each building to a single DS3 to encourage facilities-based deployment when such competitive deployment is economic.” *TRRO* ¶ 177. Because CLECs can provide service at the DS1 level by channelizing the higher-capacity facilities that the Commission found they can deploy to these buildings, *see id.* ¶ 171, there is no merit to the CLECs’ claim that it is not possible to provide DS1 service to buildings with less than four DS3s of high-capacity service.

B. The Commission Should Reject the CLECs’ Challenges to the Cap on DS1 Dedicated Transport

In the *TRRO*, the Commission found that CLECs are impaired without UNE access to DS1 dedicated transport on all routes except those between two Tier 1 wire centers. The Commission, however, capped the number of DS1 UNE transport circuits that a CLEC could obtain on a particular route at 10. *See TRRO* ¶ 128; 47 C.F.R. § 51.319(e)(2)(ii)(B). As the Commission explained, based on the efficiencies of aggregating traffic, when a CLEC requires more than 10 DS1 transport circuits, a reasonably efficient CLEC would utilize a DS3, so there is no basis for a continuing DS1 unbundling obligation. *See TRRO* ¶ 128.

For the same reason, there is no merit to the CLEC Petitioners’ claims — which are the same claims raised in their petition for reconsideration — that the cap on UNE DS1 transport has the effect of preventing CLECs from using UNE DS1 loops as part of EELs in those wire centers where UNE DS1 loops remain available. *See* Petition at 19-23. The CLECs simply ignore their ability to combine DS1 UNE loops with DS3 transport, whether obtained as a UNE or otherwise. This is what “reasonably efficient” telephone companies do. *TRRO* ¶ 24. As the Commission

recognized, “[w]hen a carrier aggregates sufficient traffic on DS1 facilities such that it effectively could use a DS3 facility,” its ability to do so negates any supposed need for UNE DS1s. *Id.* ¶ 128.

Indeed, the CLECs themselves recognize that it is “inefficient” not to multiplex traffic onto DS3 or higher-capacity transport, but seek to excuse such behavior as “not an abuse of the rules.” Petition at 21. But this misapprehends the Commission’s impairment standard, which considers a “reasonably efficient” carrier. Under that standard, incumbents cannot be required to unbundle additional DS1 transport circuits merely so that CLECs can retain the inefficient and uneconomic arrangement of maintaining many individual DS1 circuits on a transport route, rather than multiplexing. Simply put, a desire to preserve an inefficient arrangement is not a source of impairment.

C. The Commission Should Reject the CLECs’ Proposal for Eliminating the EEL Eligibility Criteria

In the *TRRO*, the Commission did not modify the EEL eligibility criteria that it adopted in the *Triennial Review Order*. See *TRRO* ¶¶ 85 n.244, 230 n.644. The Commission has stated that the purpose of those eligibility criteria is to ensure, “on a circuit-by-circuit basis,” that EELs are available only where a competitor is “provid[ing] local voice service over that circuit to a customer.” *TRO* ¶¶ 599, 602. The Commission stated further that the criteria are intended to prevent providers of “exclusively long-distance voice or data services” from obtaining EELs. *Id.* ¶ 598. In other words, the current EEL eligibility criteria are supposed to prevent CLECs from obtaining EELs as UNEs to provide a service — long-distance — as to which they are not impaired. As Verizon has demonstrated elsewhere, the current rules do not go nearly far enough

to ensure that CLECs do not obtain UNEs to provide exclusively long-distance services.²³

Elimination of those criteria, as the CLECs propose here (and as these same CLECs proposed in their petition for reconsideration), should be rejected.

The CLEC Petitioners recognize that the *TRRO* “directly prohibited the use of any UNE to provide exclusively long distance service” by making a finding of no impairment, but draw the wrong conclusion from that fact, claiming that the EEL eligibility criteria are no longer necessary. Petition at 25. In fact, the Commission’s express (and inescapable) finding of no impairment should have led the Commission to *strengthen* the EEL eligibility criteria. In any event, the key point for present purposes is that the EEL eligibility criteria have always been intended to be the *means* to ensure compliance with the Commission’s substantive rules regarding EELs. *See Supplemental Order Clarification* ¶ 21; *TRO* ¶ 591. The fact that the Commission’s decision to prohibit carriers from using EELs exclusively for long-distance services is now based on a finding of no impairment does nothing to eliminate the need for a means of ensuring that CLECs are complying with the Commission’s requirement. Tellingly, the CLECs are silent on how incumbents or the Commission are to monitor compliance with the Commission’s substantive rules regarding EELs in the absence of any eligibility criteria.²⁴

²³ The CLECs’ claim (at 26) that the “record is silent with respect to the misuse of EELs” is wrong. But, having adamantly opposed any audits of their self-certifications of their eligibility for EELs, the CLECs cannot point to the absence of audits as evidence of their actual compliance. In any event, CLEC compliance with the eligibility criteria would hardly be grounds for elimination of those criteria.

²⁴ The CLECs also contend that the EEL eligibility criteria are not well suited to VoIP providers, which might seek to obtain EELs, and are likely to lead to disputes among carriers. *See* Petition at 25-26. But the CLECs do not point to a single VoIP provider that has sought, but been unable to obtain, access to an EEL as a result of the eligibility criteria. In any event, whatever the merits of these claims — which are not substantiated — the most they would support is *modification* of the criteria, not their elimination.

CONCLUSION

For the foregoing reasons, the Commissions should deny the CLECs' petition.

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September 12, 2005

APPENDIX A

THE VERIZON TELEPHONE COMPANIES

The Verizon telephone companies are the local exchange carriers affiliated with Verizon Communications Inc. They are:

- Contel of the South, Inc. d/b/a Verizon Mid-States
- GTE Southwest Incorporated d/b/a Verizon Southwest
- The Micronesian Telecommunications Corporation
- Verizon California Inc.
- Verizon Delaware Inc.
- Verizon Florida Inc.
- Verizon Maryland Inc.
- Verizon New England Inc.
- Verizon New Jersey Inc.
- Verizon New York Inc.
- Verizon North Inc.
- Verizon Northwest Inc.
- Verizon Pennsylvania Inc.
- Verizon South Inc.
- Verizon Virginia Inc.
- Verizon Washington, DC Inc.
- Verizon West Coast Inc.
- Verizon West Virginia Inc.

CERTIFICATE OF SERVICE

I hereby certify that, on the 12th day of September 2005, I caused a copy of the foregoing Opposition of Verizon to Petition for Forbearance to be served upon each of the parties on the service list below by first-class mail, postage prepaid.

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